THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA IN KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.415 OF 2021

(ARISING OUT OF CIVIL SUIT NO.570 OF 2012)

NAMALWA JUSTINE:::APPLICANT

VERSUS

MUSENDWA LIVINGSTONE:::RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING:

Introduction:

The applicant Ms Namalwa Justine brought this application under the provisions of ***section 98 of the Civil Procedure Act, Cap 71*** and ***Order 9 rule 27 of the Civil Procedure Rules S.I 71-1,*** seeking orders that:

1. *The exparte judgement and decree in* ***Civil Suit No.570 of 2012*** *be set aside and the case be allowed to proceed inter party;*

2. *Costs of the application be provided for.*

Representation:

The applicant was represented by ***M/s Kiyemba & Matovu Advocates,*** and later by ***M/S Kintu Nteza Advocates,*** while the respondent was ***M/s KAM Advocates.*** Both counsel filed written submissions in support of their respective client's cases, the details of which are on court record.

Grounds of the application:

The grounds are contained in the affidavit in support deponed by Ms. Namalwa Justine, the applicant, wherein she deponed that this court proceeded *exparte* against her yet she was never served with any hearing notice in respect of the head suit.

That she was surprised to see a notice of change of advocates filed by ***Kintu Nteza & co. Advocates*** yet she has never given them any instructions to defend her. That the said firm which is unknown to her had received the court documents on her behalf and did not inform her about the hearing.

That her known advocates *M/S* ***Kiyemba & Matovu Advocates*** who filed the applicant's defence have never instructed any other lawyers in respect of the head suit and that upon perusal of the court record, the applicant was informed by her lawyers that a one Dibya Ronald appeared on her behalf, yet she has never instructed him to appear on her behalf.

The applicant further averred that the affidavit of Mr. Bikara Rogers dated 26th March 2015 that was filed in proof of service of hearing notices is false and that she was never served with the hearing notice.

Similarly, that whereas it is alleged that she was served through a one Alice Sengo, her daughter, as per the affidavit of Muchwa Robert, the same is false since her daughter does not reside but in Bweyogerere with her husband. That in light of the above, it was in the interest of justice that this court be pleased to set aside the *exparte* judgement as she was prevented from attending court by a sufficient reason.

The respondent on his part, opposed the application through his affidavit in reply wherein he states, *inter alia,* that he was informed by his lawyers ***M/s KAM Advocates*** that the applicant was duly served with summons and other relevant court documents.

She had filed a defence but that when the matter was subsequently fixed for hearing, the applicant kept missing court sessions; kept sending different persons which she now denies knowing, and was merely giving different excuses for her absence.

That the respondent and his lawyers were always surprised by the applicant's absence even after she had been served with court hearing notices. On two different occasions the respondent and his son led their lawyers to the applicant's home to serve her but she still did not turn up in court on the day fixed for hearing.

In addition, that the applicant was at all times aware of the suit and the dates of hearing but deliberately kept away.

The applicant did not file an affidavit in rejoinder.

Consideration of the issue:

The law:

In the application, the respondent herein filed ***Civil Suit No. 570 of 2012*** on 29th November, 2012. The applicant through her lawyers, ***M/s Kiyemba & Matovu Advocates*** then filed a written statement of defence on 23rd January, 2013.

In this application the applicant seeks to set aside the *exparte* judgement and decree *in* ***Civil Suit No.570 of 2012*** and for the case to proceed inter party. I have carefully read the pleadings as well as the submissions made for each side, which I have taken into consideration.

The applicant averred by affidavit evidence that she was prevented from attending court because she was never served with any hearing notices in respect of the suit and that the law firm of ***M/S Kintu Nteza & Advocates*** which was served on her behalf is unknown to her.

O.9 r 27 of the Civil Procedure Rules, provides that a decree passed *exparte* against a defendant may be set aside upon his or her application upon proof that he or she was prevented by any *sufficient cause* from appearing when the suit was called for hearing. This is done upon terms as court may deem fit.

It is trite that the *sufficient cause* must relate to the failure to take the necessary steps required by law, and it is demonstrated when the applicant shows that he or she had an honest intention of attending court.

The main issue for determination before this court is therefore whether there are sufficient grounds for setting aside the *exparte* judgement in ***Civil Suit No.570 of 2012***.

In the case of ***Mumello vs Bank of Tanzania (Civil Appeal No. 12 of 2002) [2006] TZCA 12*** addressing the issue of what amounts to *sufficient cause,* the Court of Appeal quoted the decision of a single Judge of the court in ***Tanga cement Company Limited Vs Jumanne D. Masangwa and Amos A. Mwalwanda Civil Application No.6 of 2001 (unreported)*** where ***Nsekela J A*** had this to say:

> ***"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant."***

This application specifically raises issues regarding service of hearing notices on the applicant. This procedure in as far as the service of summons, hearing notices as well as applications is found in ***Order 5 Rule 1 (2) of the Civil Procedure Rules*** which governs the procedure of service of summons.

Further, ***rule 16*** of the same order would require a serving officer to file an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons.

In the decision of ***UTC V. Katongole & Anor. (1975) HCB 336*** it was held that;

> ***"Proper effort must be made to effect personal service, but if it is not possible service may be on an agent."***

It was observed in ***Nzioki S/o Mutwata v. Akamba Handcraft Industries Ltd (1954) 27 KLR***, that:

> ***"The affixing of a copy of summons is no service if diligence has not been shown in trying to find the defendant, and the mere fact that the defendant is not at home on one occasion is not enough."***

It is now settled law that ***Order 5 (supra)*** regarding service of summons, also governs the service of hearing notices as was held by the Supreme Court in the case of ***Edison Kanyabware v. Pastori Tumwebaze SCCA 6/2004,*** wherein it was held:

> ***"Order 5 rule 17 (now 16) of the Civil Procedure Rules provides that where summons have been served on the defendant or his agent or other person on his behalf, the serving officer shall in all cases make or annex or cause to be annexed to the original summons an affidavit of service stating the time and manner in which summons was served..... The provisions of this rule are mandatory, it was not complied with in the instant case.***

The record in this instance shows that when the matter came up for hearing on 30th April 2014, neither the applicant nor her lawyer was present in court and counsel J.B Kakooza who appeared then for the respondent informed court on that day that he found out about the hearing from the respondent/defendant herself.

On 25th August, 2014, neither the applicant nor her counsel attended court. This court presided over by Lady Justice Eva K. Luswata took note of the fact that the applicant was aware of the hearing since her lawyers had been notified of the same.

Court further noted that she had exempted herself from further defence of her case, but at that point it declined to allow the matter to proceed *exparte*. The applicant/defendant was then granted one more chance to defend her case and the matter was then adjourned to 11th November, 2014, with directives to the respondent (plaintiff) to effect service of the hearing notices for the next hearing date.

On the appointed date, the matter was further adjourned to 19th February, 2015 and when it came up for hearing on that day, the respondent and his lawyer were present but the applicant side did not show up.

The record indicates that on that day, counsel Bikara Rogers had appeared for the respondent. As per the return service, court duly noted that the process server had served the notice on 24th September, 2014 to the applicant at her residence.

The hearing notice was duly signed, in the presence of the General Secretary of the area where the applicant resides, one Rebecca Ntege. Counsel therefore asked court to proceed *exparte* which prayer was granted.

Regarding the service for the hearing of 19th February, 2015, court relying on ***order 5 rule 13 of the CPR*** ruled that Ssengo Alice as an adult member of the applicant's family had duly received service on behalf of the applicant, who was not present at the time.

It also noted that this was an old suit and that the plaintiff had diligently followed up the matter. It was also on that same day that court had been informed that the applicant had instructed another lawyer.

It was later noted however that the firm of ***M/S Kintu Nteza*** had filed a notice of instructions on 15th September, 2014. Court thereupon ordered service to be effected to him as the new "counsel' for the applicant and had the matter adjourned to 2nd March, 2015, thus giving the applicant yet other chance to present her defence.

Hearing of the suit proceeded on 16th October, 2015 but the applicant herein still entered no appearance and neither did any of her lawyers. Court was forced to allow the matter again to proceed *exparte* since there was no explanation or communication in as far as the defendant's absence was concerned

In recognizing the service as effective and counsel Kintu Nteza as the agent of the applicant/defendant, her lordship had this to say:

> ***....service upon Nteza as counsel for the defendant was done on 8th October, 2015 by Nakazibwe Mable a process server of this court. Mr. Nteza himself acknowledged service and signed. He is taken to be an agent of the defendant within the meaning of order 3 of the CPR. No reasons have been advanced to explain the absence of the defendant and her counsel. Therefore my earlier order that the matter proceeds exparte unfortunately has to be reinstated. Because the plaintiff who has diligently followed up prosecution of this case cannot be made to wait forever for the defendant....(emphasis mine).***

Those were the circumstances and the basis upon which the final order by court to proceed *exparte* was made.

The above was also demonstration that in a number of times court had to review its own decisions in order to accommodate the applicant's dilatory conduct. On record and in proof of that assertion, were several affidavits of service sworn by different court process servers.

It is settled law that facts pleaded in an affidavit if not challenged are taken as the truth. The applicant did not file any rejoinder to challenge the issues raised in the respondent's reply. She did not deny ever being served with the said hearing notices.

The order which recognized Mr. Kintu Nteza as the applicant's agent was never challenged, not until six years later through this application, when court had already pronounced itself on the suit on 19th August, 2020, which she chose to challenge after failing to take the appropriate legal steps to challenge the order made to proceed *exparte* against her. It was not until June, 2021 that she had woken up to file this application.

It is further worth noting that even though the new counsel Kintu Nteza came into the picture and did so as early as 15th September, 2014, the applicant could not deny the fact that she herself had been served at her residence with a notice of the next hearing date, which was 31st March, 2015, as per affidavit of service bearing the same date.

Once again the General Secretary of the area was in attendance. Photographs were taken and attached to the respondent's documents as proof of such service. Also attached were the witness statements, indicating that the respondent had taken the trouble to effect service to the applicant at her residence, notify her of the evidence he intended to rely on and the date on which the matters were to be heard.

When therefore on 31st March, 2015 the next date fixed for hearing only counsel Felix Kintu appeared, in the view of this court, failure by ***M/s Kiyemba & Matovu Advocates*** to appear on that day and other days subsequent to that lent credence to the belief that she had indeed instructed other lawyers to take up the defence from ***M/s Kiyemba & Matovu Advocates***.

If not, then one would be justified to conclude that at all material times the applicant was duly represented by ***M/s Kiyemba & Matovu Advocates*** who however never turned up in court each time the matter was called. Strangely though, the applicant did not place the blame on the firm. If they still had instructions perhaps the case would have taken a different direction.

It was thus evident that the last action taken by the firm ***M/s Kiyemba & Matovu Advocates*** had been on 1st April, 2014 when counsel filed a letter demanding from the plaintiff/respondent for costs for appearance that were awarded by court.

No further action was taken by either the applicant or her lawyers to file witness statements and prosecute their defence. It was not until 9th March, 2021, 6 years later when the same lawyers returned, to file the instant application.

No explanation was advanced by either the applicant or her lawyers as to why no action was taken by either them until years later, when they filed this application, despite the fact that they were aware that there was a pending suit against the applicant. For a matter that was filed in 2012, that was dilatory conduct on the part of the applicant.

Thus in the case of ***Winnie Ddungu T/A Ddungu Winnie Traders Vs Stanbic Bank (U) Ltd, Misc Appl. No.902 of 2013 at 11*** the court held that a litigant's right to hearing is vitiated if the litigant is guilty of dilatory conduct in the instruction of his lawyer.

It is trite that the test for reinstatement of a suit is whether the applicant honestly intended to attend and did his best to do so. ***(See: National Insurance Corporation Vs Mugenyi & Co Advocates (1987) HCB 28)***.

The second test I may add, which the respondent in this application had passed, was based on the several times, efforts and diligence it took him to serve the applicant, a party who at all times appeared elusive and uninterested in what was taking place.

It is this court's belief and finding therefore that the evidence on record is enough to prove that applicant was sufficiently made aware by the respondent of whatever was going on in court, to the point of receiving witness statements in her home. She never attempted to respond to any of these actions.

In view of the facts as set out hereinabove, at all material times the applicant was duly represented; and had been made aware of the suit filed against her. She failed to do her best to follow up on her defence. Here was clear demonstration that the applicant did not honestly intend to attend court.

Since no action was ever taken by her or her lawyers in a bid to prosecute the same, it would appear that the instant application was therefore more or less an afterthought meant to delay the course of justice.

In the final result, I find that this application lacks merit and is hereby dismissed with costs.

I so order.

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Alexandra Nkonge Rugadya

Delivered via email

30/9/2021

Judge

28th September 2021.